Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

G.A. HOLT,

Petitioner,

vs.

JOSEPH O. LEWIS, JOSEPH O. DEAN, WILLIAM E. HULL and SAMFORD UNIVERSITY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is there an implied right of action for retaliation under Title IX?

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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APPENDIX

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Appendix B — Memorandum Opinion and Order of the United States District Court for the Northern District of Alabama, Southern Division Entered December 13, 1995 ..... 3a

Petitioner, G.A. Holt, respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 109 F.3d 771 (1997) and is reproduced in the Appendix filed herewith ("App.") at 1a. The opinion of the District Court is reported at 955 F. Supp 1385 (N.D. Ala. 1995) and is reproduced at 3a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTE INVOLVED

The pertinent provision of Title IX of the Civil Rights Act of 1964, as amended, 20 U.S.C. § 1681, *et seq.* (Title IX) is set forth below:

> § 1681(a). No person in the United state shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . .

STATEMENT OF THE CASE

Dr. Gary Holt was a professor at Samford University's School of Pharmacy. He was a good teacher, and had been voted teacher of the year in every year he was eligible for that honor. In September of 1993, a woman student complained to him about

sex discrimination she had suffered. Dr. Holt directed the student to the appropriate office to file her complaint, and he himself notified the office of the Dean of the Pharmacy School and the Office of the Provost of the University. In October of 1993, Dr. Holt was instructed by Dr. Joe Lewis, Assistant to the Provost, to keep the matter of the sex discrimination complaint quiet. Concerned about the student's complaint Dr. Holt telephoned the Samford University trustee, Dr. Phillip Walton, M.D., and expressed his concerns about the matter. Shortly thereafter Samford University officials began a campaign of retaliation against him because of these complaints. The Dean made disparaging remarks about Dr. Holt at faculty meetings. Dr. Holt was called in by Dr. Lewis and reprimanded about pressing the sex discrimination complaint to the trustee. Dr. Lewis told him that he should just forget about the situation. Dr. Holt requested a formal grievance on this matter, but was denied. Shortly after that, the Provost told Dr. Holt that Samford University was not going to renew his contract. The reason he gave was because Dr. Holt had pressed the discrimination complaint to the trustee after he had been told to be quiet about it. To avoid the black mark of termination on his record, Dr. Holt resigned.

Dr. Holt filed a charge of retaliation with the Equal Employment Opportunity Commission (EEOC) on May 10, 1994. The EEOC issued a "right to sue" letter on May 30, 1995. Dr. Holt filed his complaint timely in the Circuit Court of Jefferson County, Alabama, alleging retaliation in violation of Title VII and Title IX of the Civil Rights Act of 1964, as amended, against Samford University, Joseph O. Lewis, Joseph O. Dean, and William E. Hull, individually. The Respondents removed the matter to the United States District Court for the Northern District of Alabama on October 6, 1995. Subject matter jurisdiction over these matters was proper under 28 U.S.C. § 1331.

On December 13, 1995, District Judge William M. Acker dismissed Dr. Holt's claims, granting the Respondents' motions to dismiss and for judgment on the pleadings on the grounds that (1) Title VII retaliation only protects complaints about employees, and since the Pharmacy School student was not an employee, Title VII afforded no protection, and (2) since Title IX did not have an express provision for retaliation the court was unwilling to find a cause of action for retaliation implicit in the statute. The District Court went on to suggest that a retaliation complaint by Dr. Holt, who was merely advancing another's claim, and not advancing his own, would not be covered by the statute.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court and commended the analysis of the District Court's opinion. Petitioner Dr. Gary Holt requests this Court to address that portion of his complaint under Title IX retaliation and reverse the Eleventh Circuit's order affirming the dismissal of his Title IX retaliation claim.

REASON FOR GRANTING THE WRIT

The federal circuit courts of appeal are split over whether an action for retaliation is implicit in Title IX. This Court should grant the writ to resolve this issue and to provide guidance in the expanding area of Title IX retaliation actions. Four federal circuit courts of appeal have considered Title IX retaliation claims: the Fourth Circuit in *Preston v. Commonwealth of Virginia ex rel New River Community College*, 331 F.3d 203 (1994), the Second Circuit in *Murray v. New York University College of Dentistry*, 57 F.3d 243 (1995), the Eighth Circuit in *Brine v. University of Iowa*, 90 F.3d 271 (1996), and the Eleventh Circuit in this case[1]. All but the Eleventh Circuit have recognized

1. The Eleventh Circuit endorsed the district court's opinion, which is reported as *Holt v. Lewis*, 955 F. Supp. 1385 (N.D. Ala. 1995).

a retaliation action implicit in Title IX. In addition, several district courts have addressed this issue. *See Clemes v. Del Norte County Unified School District,* 843 F. Supp. 583 (N.D. Cal. 1994); *Clay v. Board of Trustees of Neosho County Community College,* 905 F. Supp. 1488 (D. Kan. 1995); *Topol v. Trustees of the University of Pennsylvania,* 160 FRD 476 (E.D. Pa. 1995); *Nelson v. University of Maine System,* 914 F. Supp. 643 (D. Me. 1996). Retaliation actions promise to be an growing area under Title IX. Since a retaliation action is an essential part of this antidiscrimination statute's enforcement mechanism, this Court should grant the writ and recognize explicitly what is implicit, but nevertheless fundamental to this important anti-discrimination statute.

I.

THERE IS AN IMPLICIT RIGHT FOR RETALIATION UNDER TITLE IX.

The district court's opinion, which the Eleventh Circuit affirmed without opinion, contradicts this Court's teaching in *Cannon v. University of Chicago*, 441 U.S. 677, and in *North Haven Board of Education v. Bell,* 456 U.S. 512. In *Cannon,* this Court held that Title IX was to be enforced through an implied right of action. In *North Haven*, this Court recognized that if Title IX was to be given the scope it was intended to have, it must be accorded a sweep as broad as its language. The opinion in this case unduly restricts the scope of Title IX, requiring too high a sacrifice from those who would participate in the act's enforcement.

The majority in *Cannon* concluded that Congress, in enacting Title IX, was familiar with the Supreme Court's then common practice of finding implied rights of action in federal statutes. The *Cannon* majority concluded that Congress relied

on the Supreme Court's practice in crafting Title IX. In reaching its conclusion the *Cannon* Court relied on six cases where the Supreme Court had found an implied right of action in the decade immediately preceding enactment of Title IX.[2] One of these "implied right of action" cases was *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969). *Sullivan* was a retaliation case. This Court held that Sullivan, a white property owner, had an implied right of action for his expulsion from a neighborhood park association because he had tried to transfer his interest to a black person. The white property owner sought redress for retaliation under 42 U.S.C § 1982. Though there was no express provision for retaliation this Court found an implied right for retaliation under § 1982. *Sullivan* held that a failure to include such an action would perpetuate the discrimination the statute was enacted to remedy. It said:

> We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows v. Jackson*, 346 U.S. 249, 259, that the white owner is at times "the only effective adversary" of the unlawful restrictive covenant. Under the terms of our decision in *Barrows*, there can be no question but that Sullivan has standing to maintain this action.

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2. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 this Court again relied on these six cases to support its conclusion that damages were available under Title IX.

The same force of logic applies to retaliation actions under Title IX. Without an implied action for retaliatory conduct, schools that seek to punish supporters of Title IX discrimination claims will be able to sanction with impunity. This will have an inevitable chilling effect on those who might otherwise be hot to report sex discrimination in education. This will tend to naturally dissuade anyone subject to the School administration's censure from supporting Title IX claims and, thereby undermining the antidiscriminatory intent of the statute. Like *Sullivan,* it is the teacher, in this case Dr. Holt, who is often the only effective adversary of unlawful sex discrimination in education. Teachers provide the most ready avenues of communication between students and the school administration. This is even more significant where, as is often the case in matters of sex discrimination, victims may have a certain reticence to speak out. If school administrations may retaliate with impunity for complaints of sex discrimination, Title IX will not have the broad scope the *North Haven* court envisioned. On the contrary, if every complaint of sex discrimination carries with it the risk of irremediable retaliation the statute will soon cease to be a viable anti-discrimination statute.

The "failure to speak" analysis which the lower court adopts in this case is similar to the view this Court rebuffed in *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60. The lower court concluded that had Congress intended an action for retaliation it would have written one in to the statute. Responding to a similar argument the *Franklin* Court answered that "[s]ince the Court in *Cannon* concluded that this statute supported no express right of action, it is hardly surprising that Congress also said nothing about applicable remedies for an implied right of action." *Franklin* at p. 71. If the right of action itself is implied then one would hardly expect explicit protection for advancing that right.

The lower court's opinion in this case also conflicts with decisions in the Second, Fourth and Eighth Circuit Courts of Appeals that recognize a Title IX retaliation action . *See Preston v. Commonwealth of Virginia ex rel New River Community College,* 331 F.3d 203 (C.A. 4 1994) (VA) at 206; *Murray v. New York University College of Dentistry,* 57 F.3d 243 (C.A. 2 N.Y.) (1995) at 251; *Brine v. University of Iowa,* 90 F.3d 271 (1996) at 273-274.

The Fourth Circuit, following *Cannon*, held that Title IX was to be interpreted and enforced in the same manner as Title VI of the Civil Rights Act of 1964. It reasoned that the Department of Education incorporated by reference all of Title VI's procedural provisions into Title IX with 34 C.F.R. § 106.71. Since one of these regulations, 34 C.F.R. § 100.7(e), prohibits retaliation for claims of discrimination the court concluded that Title IX had an anti-retaliation provision engrafted into it.

The Second Circuit, in *Murray,* following this Court's opinion in *Franklin*, analyzed Title IX by analogizing it to Title VII. It looked to Title VII to define the contours of the implied rights of action under Title IX, adopting a Title VII *prima facie* case for Title IX retaliation claims. Its analysis was different, but it reached the same conclusion as the *Preston* court. The Eighth Circuit in *Brine*, without analysis, set out the elements of a retaliation claim under Title IX.

The competing federal court analyses of Title IX retaliation — the lower court's "failure to speak" analysis, the Fourth Circuit's incorporation of Title VI's regulations, the Second Circuit's Title VII analogy — underscore the need for this Court's guidance on this issue. This is especially so, given that different frameworks will have vastly different results in the enforcement of Title IX complaints. No matter what analysis is used the irrefutable logic of the *Sullivan* court still holds. Without

an implicit retaliation provision, Title IX will only offer an unsavory choice to those who would report discrimination. They can do the right thing and risk their job, or keep their job and remain silent.

CONCLUSION

For the reasons stated, petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 21, 1997

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-6046

D.C. Docket No. CV-95-AR-2574-S

DR. G. A. HOLT,

Plaintiff-Appellant,

versus

JOSEPH O. LEWIS, M.D., JOSEPH O. DEAN, DR., WILLIAM E. HULL, M.D., both individually and in their official capacity, SAMFORD UNIVERSITY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(February 21, 1997)

Before DUBINA and BLACK, Circuit Judges, and EISELE*, Senior District Judge.

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* Honorable Garnett Thomas Eisele, Senior U.S. District Judge for the Eastern District of Arkansas, sitting by designation.

Appendix A

PER CURIAM:

We affirm the district court's judgment of dismissal based on its well-reasoned memorandum opinion entered on December 13, 1995.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION ENTERED DECEMBER 13, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.

CV-95-AR-2574-S

DR. G.A. HOLT,

Plaintiff,

v.

JOSEPH O. LEWIS, et al.,

Defendants.

MEMORANDUM OPINION

The court has before it two potentially dispositive motions filed by defendants in the above-entitled action. The first is a motion to dismiss filed by defendants Joseph O. Lewis ("Lewis), Joseph O. Dean ("Dean"), and William E. Hull ("Hull") (collectively "the individual defendants"), on October 10, 1995. The second is a motion for judgment on the pleadings filed jointly by the individual defendants and defendant Samford University ("Samford") on October 19, 1995. Because plaintiff can prove through his complaint and through the pleadings now before the court no set of facts that will entitle him to relief, both motions are due to be granted, and the action will be dismissed as to all parties.

Appendix B

I. The Facts

Plaintiff Dr. G.A. Holt ("Holt") was employed by Samford as a professor in its School of Pharmacy from 1991 to 1994. During his tenure at Samford, Holt often supported those of his students who complained of discrimination at the hands of Samford and brought his concerns about the alleged discriminatory treatment of students to the attention of Samford officials in accordance with Samford's anti-discrimination policy.

In September of 1993, Holt was informed by a female student that she was being discriminated against on the basis of her gender. Holt directed this student to the appropriate Samford officials and then personally notified the offices of the Dean of the School of Pharmacy and the Samford Provost of the situation. During the following month after being notified by Lewis to keep the matter private, Holt telephoned a Samford trustee, Dr. Phillip Walton, and informed Dr. Walton of his concerns regarding the situation. Following this contact with Dr. Walton, Holt's relationship with Samford and the School of Pharmacy deteriorated significantly. After a repeated warning from Lewis in December of 1993 that Holt should forget the situation, Holt was informed on January 27, 1994, that Samford was not going to renew his contract. The reason given to Holt for this action by Samford officials was that Holt had gone to Dr. Walton with the discrimination complaint. Rather than face the stain of a termination in his professional record, Holt resigned his post at Samford.

Holt filed his complaint in this action on August 30, 1995, with the Circuit Court of Jefferson County, Alabama, alleging violations of both Title VII of the Civil Rights act of 1964 ("Title

VII"), 42 U.S.C. 2000e *et seq.*, and Title IX of the Educational Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.* Defendants removed the action to this court on October 6, 1995.

II. Analysis

When ruling on either a motion to dismiss or a motion for judgment on the pleadings, the court must view the pleadings in the light most favorable to the non-moving party and likewise draw all inferences in favor of the non-movant. *United States v. Wood*, 925 F.2d 1580, 1581 (7th Cir. 1991). The court may grant either motion only where it is beyond doubt that the non-movant can prove no facts that would support his claim for relief. *Pataula Elect. Membership Corp. v. Whitworth*, 951 F.2d 1238, 1240 (11th Cir.), *cert. denied* 113 S. Ct. 302, *and cert. denied sub nom. Georgia Power Co. v. Pataula Elec. Membership Corp.*, 113 S. Ct. 302 (1992).

a. The Individual Defendants

Defendants Lewis, Dean and Hull seek a dismissal on two grounds. First, they claim that they are not employers under Title VII and for that reason cannot be held liable for any violations of that act. The relief granted under Title VII is against the *employer. Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991). When an employer has been made a party to a Title VII action, specific persons named in either their individual capacities or as agents of their employer are improper defendants. *Id.* ("[T]he proper method for a plaintiff to recover under Title VII is by suing the employer, *either* by naming the supervisory employees as agents of the employer or by naming the employer directly." (emphasis added)). Therefore, these individual defendants' motion to dismiss is due to be granted

insofar as they have been sued under Title VII in both their individual and official capacities.

These defendants also claim that they are similarly impervious to Title IX liability. Title IX applies to entities, including persons, who receive federal funds. 20 U.S.C. § 1681. Clearly this implicates defendant Samford due to the federal financial assistance provided to Samford students. *Grove City College v. Bell,* 465 U.S. 555 (1984). However, there is no indication in the statute that actions to enforce the provisions Title IX can be directed against anyone other than the educational institution involved. *Dickinson v. McCarty,* No. 93-8210, 1994 WL 706979 at *5 (S.D. Fla. Aug. 2, 1994). *See also Doe v. Petaluma City School Dist.,* 830 F. Supp. 1560, 1576-77 (N.D. Cal. 1993). Thus, defendants' motion to dismiss is due to be granted, and plaintiff's title IX claims must be dismissed as to defendants Lewis, Dean and Hull in both their individual and official capacities.

Because plaintiff's claims both under Title VII and under Title IX can only be directed at defendant Samford as both the employer and the educational institution involved, the motion to dismiss of defendants Lewis, Dean and Hull must and will be granted.

b. Title VII Retaliation

Count I of the complaint alleges that plaintiff was constructively discharged from his position in *retaliation* for his continuing efforts to make Samford officials aware that sex-based discrimination of students was taking place. Plaintiff contends that such a retaliatory discharge is unlawful under Title VII. The anti-retaliation provision of Title VII states:

Appendix B

> It shall be an unlawful employment practice for an employer to . . . discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter. . . .

42 U.S.C. § 2000e-3(a). "[A] plaintiff alleging a retaliation claim under Title VII must begin by establishing a *prima facie* case; the plaintiff must show (1) that [he] engaged in statutorily protected activity, (2) that an adverse employment action occurred, and (3) that the adverse action was causally related to the plaintiff's protected activity." *Couto v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995). Defendants, including Samford, attack plaintiff's complaint on the grounds that his notification to Samford officials that students were being unfairly discriminated against on the basis of their gender is not a statutorily protected activity and thus plaintiff has failed to establish his *prima facie* case.

The initial element of plaintiff's *prima facie* case is "established if [he] can show that he opposed an unlawful ***employment practice*** which he reasonably believed occurred." *Bigge v. Albertsons, Inc.*, 894 F.2d 1497 (11th Cir. 1990) (emphasis added). Title VII defines an employment practice as follows:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

> conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). "[I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality ***in employment opportunity*** due to discrimination on the basis of . . . sex. . . ." *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 763 (1976) (emphasis added).

Taking the facts alleged by plaintiff as true, plaintiff's complaint fails to state a cause for retaliation for which relief can be granted under Title VII. Plaintiff alleges that he championed the cause of "a woman *student*" who was "a victim of sexual discrimination" at Samford. *Complaint* at ¶ 7 (emphasis added). He has not alleged that this student was discharged from employment, not chosen for employment, or otherwise denied any privilege of employment by Samford. Framing the allegations of the complaint in the light most favorable to plaintiff, he has only asserted that a female student was being unfairly treated by an instructor and that his opposition to this treatment ultimately led to his constructive discharge. This in no way indicts any *employment* practice on behalf of Samford.

Without more, any retaliation by defendants for plaintiff's advocacy of a student's rights is simply not prohibited by Title VII.

Because plaintiff did not oppose a discriminatory action that is proscribed by the statute, plaintiff fails to state a claim of retaliation under Title VII, and defendants' motion is due to be granted.

c. Title IX Retaliation

Defendants also argue that dismissal is proper as to Count II, plaintiff's Title IX claim, on the grounds that Title IX does not provide a private cause of action for retaliation to a "whistle blower" who has not himself suffered sex-based discrimination. Title IX provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a). Remarkably absent from Title IX, however, is an express statutory remedy for retaliation. The Supreme Court has recognized that a *limited* implied cause of action exists to enforce private rights under Title IX for those plaintiffs who have directly suffered sex-based discrimination. *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979). This implied private right of action has ever been extended past the injunctive remedy allowed in *Cannon* to provide for monetary relief where educational institutions have discriminated on the basis of a

person's gender. *Franklin v. Gwinnett County Public Schools*, __ U.S. __, 112 S. Ct. 1028, 1032 (1992). However, neither the Supreme Court nor the Eleventh Circuit has recognized a cause of action for retaliatory discharge under Title IX.

Unlike the creators of § 2000e-3(a) of Title VII, the congressional authors of Title IX failed to include any express protections against retaliation when considering the problems of gender equity in our nation's educational institutions. This failure to speak is significant when compared to § 2000e-3, a vital piece of the Title VII safeguards enacted only eight years prior to Title IX. When presented with such a stark contrast in otherwise closely related civil rights legislation, it is helpful to keep in mind that "congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intended to include that issue only where it has so indicated." *United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991). Congress has shown that where it intends to outlaw retaliation in the protection of civil rights, it will do so. Plaintiff has failed to persuade this court that the omission of such protection from Title IX is a mere oversight.

Having said this, this court acknowledges a limited trend by other courts that recognize "retaliation" claims under Title IX. *See Preston v. Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203 (4th Cir. 1994); *Clay v. Board of Trustees of Neosho Community College*, No. 94-2282-EEO, 1995 WL 646537 (D. Kan. Oct. 13, 1995). The standard bearer for this trend and the case primarily relied upon by plaintiff for arguing that such a cause of action exists in *Preston*. Beside the obvious statement that Fourth Circuit law is not binding precedent in this case, this court respectfully declines to be swept up in this trick and expressly refused to turn it into a veritable

flood by creating a second layer of implied theory of liability by expanding dramatically upon a non-binding opinion which created an implied cause of action only within the Fourth Circuit.

The court in *Preston* found an implied cause of action for retaliation existed under Title IX after the plaintiff was dismissed for filing complaints[1] of sex-based discrimination against her employer. *Preston*, 31 F.3d at 206. The Fourth Circuit reached its matter-of-fact conclusion that such a retaliation claims exists after finding its authorization in the Department of Education ("the DOE") regulations found at 34 C.F.R. § 106.71 (1995).[2] *Id.* at n.2. The *Preston* court held that § 106.71's incorporation of the DOE regulations regarding Title VI of the Civil Rights Act of 1964, more specifically 34 C.F.R. § 100.7(e),[3] was a

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1. Preston, employed as a counselor for student support services, was dismissed after filing claims of discrimination with the Office of Civil Rights of the Department of Education as well as with the Equal Employment Opportunity Commission. *Preston*, 31 F.3d at 205. In contrast, Dr. Holt alleges that he was forced to resign after notifying a Samford trustee of a continuing problem with gender based discrimination of students at the school.

2. This regulation states:

> § 106.71 Procedures.
>
> The *procedural* provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 C.F.R. 100.6-100.11 and 34 C.F.R., Part 101.

34 C.F.R. § 106.71 (1995) (emphasis added).

3. The relevant portion of this regulation states:

(Cont'd)

sufficient basis for creating an anti-retaliation private cause of action under Title IX. *Id.*

First and foremost, this court expressly rejects the *Preston* analysis in favor of its own "failure to speak" appraisal discussed above. The *Preston* court has derived a private cause of action from an agency regulation incorporating the *procedural* provisions of the regulations created to control the investigation of claims of racial discrimination in educational institutions under Title VI of the Civil Rights Act of 1964. This tortured link manufactured in *Preston* pales when compared to the argument that Congress knows how to write remedial legislation but has chosen not to do so for potential Title IX retaliation plaintiffs.

Furthermore, were this court inclined to build on the sandy foundation established by *Preston* and its progeny, the facts framed by plaintiff's complaint do not provide a compelling case for doing so. Plaintiff does not allege that he was discriminated against due to his gender — circumstances that

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(Cont'd)

§ 100.7 conduct of investigations.

(e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e) (1995) (emphasis supplied).

were unquestionably the motivating basis for the creation of Title IX. His anguished cry for relief from his constructive discharge for allegedly championing the rights of those who are clearly entitled to protection is just too far logically removed from the coverage of Title IX to move this court to create a private cause of action for retaliation at this time.

Because Title IX does not provide a private cause of action for plaintiffs who claim retaliatory discharge, dismissal is proper on this issue as to all defendants and the defendants' motion for judgment on the pleadings is due to be granted.

III. Conclusion

Because supervisory personnel, whether named in their individual or official capacities, are not proper targets for either a Title VII retaliation claim where the actual employer is a named defendant or a Title IX claim under any circumstance, plaintiff's action is due to be dismissed as to defendants Lewis, Dean and Hull. Furthermore, because plaintiff neither engaged in any activity protected by Title VII nor was discharged in violation of Title IX, both Counts of plaintiff's complaint are due to be dismissed as to all defendants. Because the court can foresee no circumstance whereby plaintiff can recast the claims in his complaint to state a valid cause of action under either Title VII or Title IX, the court will not grant plaintiff leave to amend his complaint. *Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985). Accordingly, both the motion to dismiss and the motion for judgment on the pleadings now before the court are due to be granted and plaintiff's action will be dismissed with prejudice. A separate and appropriate order will be so entered.

Appendix B

DONE this 13th day of December, 1995.

s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.

CV-95-AR-2574-S

DR. G.A. HOLT,

Plaintiff,

v.

JOSEPH O. LEWIS, et al.,

Defendants.

ORDER

In accordance with the accompanying memorandum opinion, both the joint motion of Joseph O. Lewis ("Lewis"), Joseph O. Dean ("Dean"), and William E. Hull ("Hull") to dismiss as well as the joint motion of Lewis, Dean, Hull and Samford University for judgment on the pleadings are hereby GRANTED, and the action is DISMISSED WITH PREJUDICE.

Costs are taxed against plaintiff, Dr. G.A. Holt.

DONE this 13th day of December, 1995.

s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 10 1997
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(2)

No. 96-1952

In The

Supreme Court of the United States

October Term, 1996

G.A. HOLT,

Petitioner,

vs.

JOSEPH O. LEWIS, JOSEPH O. DEAN, WILLIAM E. HULL and SAMFORD UNIVERSITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this court should not only find an implied cause of action, but should also legislate a substantive prohibition not present in Title IX.

II. Whether there is really a "split" among the circuits.

III. Whether the issue plaintiff raises is dispositive of this action.

IV. Whether the judgment in favor of the individual respondents under Title IX should not be reviewed because it is based the separate and independent ground that Title IX does not provide for an action against individual employees of an educational institution.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed. The members of the Samford University Board of Trustees are:

Dr. Boyce S. Albright
Dr. Jerry Armor
Mr. N. Carlton Baker
The Rev. O. Leon Ballard
Mr. Sloan Y. Bashinsky, Sr.
Mr. Donald C. Brabston
Mr. Harry B. Brock, Jr.
Mr. Ben B. Brown
Mr. John A. Caddell
The Rev. Dr. Charles T. Carter
Mr. Boyd Christenberry
Mr. William T. Coplin
Mr. Austin Dean
Mr. Earl Dove
Dr. Michael A. Drummond
Mr. John B. Givhan
Mr. H. Hobart Grooms, Jr
Dr. G. Truett Guffin
Dr. Carey Gwin
Mr. Elmer B. Harris
Mr. Ben F. Harrison
Mr. James A. Head
Ms. Miriam Higginbotham
Mr. A. Gerow Hodges
Mr. Richard D. Horsley
The Rev. Dr. J. Calvin Kelly
Mr. Rex J. Lysinger

Mrs. Helen Macon
Mr. Wallace D. Malone
Dr. John P. Mims
The Rev. Dr. Troy L. Morrison
Dr. Victor E. Nichol
Mr. R. Franklin Parker
Mr. Ray Pearman
Dr. Harry M. Philpott
Dr. Lawrence H. Phipps
Mr. John C. Pittman
The Honorable T. Virgil Pittman
The Rev. Dr. John T. Porter
Mr. James H. Sandlin
The Rev. Dr. W. K. Stephenson
Mr. James C. Stivender
The Honorable Stanley A. Wade
Dr. Philip D. Walton,
The Rev. Dr. P. Joe Whitt

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Joseph O. Lewis, Joseph O. Dean, William E. Hull and Samford University, respectfully request that this Court deny the petition for certiorari, seeking review of the Eleventh Circuit's opinion in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 109 F.3d 771 (1997) and is reproduced in the Appendix filed herewith ("App.") at 1 a. The Opinion of the United States District Court for the Northern District of Alabama is reported at 955 F.Supp. 1385 (N.D. Ala. 1995) and is reproduced at 3 a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 21, 1997. This Court has jurisdiction over this case under 28 U.S.C. 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

The statute at issue is Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681- 1688 (hereinafter Title IX). The only substantive prohibition of conduct that appears in Title IX reads as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681. Petitioner requests this Court to interpret Title IX to include additional language that does not appear anywhere in the statute.

STATEMENT OF THE CASE

Petitioner G.A. Holt (hereinafter "Petitioner" or "Holt") was employed by respondent Samford University (hereinafter "Samford") as a professor in the School of Pharmacy from 1991 to 1994. Neither Respondent William E. Hull (hereinafter "Hull") nor Respondent Joseph O. Dean is specifically identified in the Complaint, but Hull is referred to as Samford's Provost, and Dean is referred to as the Dean of the School of Pharmacy. Respondent Joseph O. Lewis (hereinafter "Lewis") is identified in the Complaint as the Assistant to the Provost.

Holt alleges in the Complaint that during his employment at Samford, he repeatedly supported "women students and other students who were being, or complained of being discriminated against." Holt alleges that he brought his concerns about discriminatory treatment of students to Samford officials in compliance with Samford's instructions. Specifically, Holt says that he was approached in September 1993 by a woman who complained of being subjected to sex discrimination. He directed that unnamed female student to appropriate officials and notified the offices of Hull and Dean.

Holt does not allege whether Samford or any of the individual respondents took appropriate action to address, investigate or remedy the alleged discrimination against the female student. There is no allegation that Samford or any Respondent failed to remedy the alleged discrimination, and there is no allegation that any Respondent retaliated against the female student for reporting her concerns to Holt or the "appropriate officials." Holt says that in October, Lewis told him to "keep the matter quiet," but instead, he telephoned a

Samford trustee and informed him of the situation.[1] Holt alleges that after he spoke with the trustee, his treatment by Samford officials, including Dean, deteriorated. Holt says that he was called to Hull's office on "more than two" occasions, and criticisms of Holt were discussed. Holt also says that Dean made disparaging remarks about Holt, and that Holt was denied office space he had requested.

Holt alleges in the complaint that after he spoke with the trustee, he was called before Lewis and was "reprimanded that he had been told to keep quiet about the discrimination complaints and that he should just forget about the situation." Holt also alleges that on January 27, 1994, he was informed that Samford would not renew his contract for the following year. Holt says that Hull told him the reason for the non-renewal of his contract was "that he had gone to the Trustee with the information regarding the discrimination complaint." Holt says that in order to avoid "termination," he resigned.

Hold does not allege anywhere in the complaint that he filed a complaint in writing related to his concerns about sex discrimination against a female student with the Department of Education against Samford or any individual petitioner. It is undisputed that Holt did not file a written complaint with the Department of Education.

Holt filed this complaint in the Circuit Court for Jefferson County, Alabama, on August 30, 1995 based upon Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and Title VII of the Civil Rights Act of 1964, 42

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[1] Holt does not identify the "female student" in his complaint. Perhaps his failure to identify the student was motivated by the same concern for the privacy of the student that may have motivated Samford officials to ask Holt not to discuss the situation outside Samford's established channels for addressing discrimination complaints.

U.S.C. § 2000e.[2] Holt alleged that he had been retaliated against in violation of Title VII and Title IX because he had "supported students who had been, or who complained of being discriminated against." Respondents removed the action to he United States District Court for the Northern District of Alabama on October 6, 1995.

On October 10, 1995, Respondents Lewis, Dean and Hull moved the district court to dismiss them as defendants on the grounds that Holt had failed to state a claim against them upon which relief could be granted. Specifically, the individual Respondents asserted that they were not subject to suit under either Title VII or Title IX, and that the appropriate defendant under those statutes, if any, was Samford, which was the employer under Title VII and the alleged recipient of federal financial assistance under Title IX.

On October 19, 1995, while the motion to dismiss was pending, all Respondents filed a motion for judgment on the pleadings under Rule 12(c), Fed.R.Civ.P. As grounds for the motion for judgment on the Title VII claims, Respondents asserted that Holt was not protected by Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-(3)(a), because he had not "opposed" a discriminatory employment practice. In support of the motion for judgment on the Title IX grounds, Respondents pointed out that, unlike Title VII and a myriad other federal employment and civil rights statutes, Title IX does not contain a prohibition against "retaliation," and Holt is not a member of the class which Title IX protects.

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[2] Although argued in the Petition, Holt did not allege in the Complaint that he filed a timely charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC"), which is a condition precedent to suit under Title VII. 42 U.S.C. § 2000e-5(b) and (e); *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385 (1982).

The district court entered an order and opinion on December 13, 1995, granting the individual respondents' motion to dismiss, and also granting the motion of all respondents for judgment on the pleadings. Holt filed a timely notice of appeal from the entry of the order granting the motion for judgment on the pleadings. He did not appeal the grant of the motion to dismiss Lewis, Dean and Hull.[3] The Eleventh Circuit entered its order affirming the judgment of the district court on February 21, 1997.

REASONS FOR DENYING THE WRIT

The Court should not grant the writ because Title IX does not prohibit retaliation against an employee who has reported alleged sex discrimination against a student to a University trustee and who has not filed a claim of discrimination with the Department of Education. The cases decided by the Fourth, Second and Eighth Circuits are so lacking in factual similarity to this case, and equally lacking in legal analysis of the issues, that their holdings cannot fairly be characterized as a "split" with the Eleventh Circuit. This Court should deny the writ and allow the decisions of the various circuits fully to develop into a cohesive body of law. A decision of this Court at this time is premature, and the facts of this particular case do not allow for a well-developed presentation of the issue. Furthermore, the judgments in favor of the individual respondents rest upon adequate and independent grounds that have not been presented for review in the Petition.

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[3] Respondents Lewis, Dean and Hull filed a motion to dismiss the appeal against them because Holt had failed to file a notice of appeal from the order granting their motion to dismiss. The Eleventh Circuit carried the motion with the case, and denied it on the basis of mootness after the district court's judgment was affirmed.

I. This Court Should Not Grant The Writ To Enact A Substantive Prohibition Of Conduct That Congress Chose Not To Prohibit And Then Infer A Private Right Of Action To Enforce The Nonexistent Substantive Prohibition.

Petitioner Holt argues that the Court should find an implied right of action for retaliation under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. In actuality, Holt is not asking this court merely to infer a private right of action under Title IX, but instead is asking the Court to create a substantive prohibition of conduct that is simply not prohibited by Title IX, and to expand the class of persons Congress intended to protect by Title IX. As clearly written, Title IX protects only the class of persons who are excluded from participation in, or denied the benefits of, or have been subjected to discrimination based on sex in any federally assisted education program or activity. Title IX provides, in pertinent part, as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681.

Congress clearly intended to protect persons from sex discrimination in federally-assisted education programs and activities. Holt does not allege that he was discriminated against on the basis of his sex. He is therefore not within the scope of persons that Congress chose to protect by Title IX.

Title IX simply does not contain a prohibition against retaliation. As the district court correctly found, Congress "knows how to write" substantive prohibitions against retaliation, and Congress does so when it so intends. This is evident from the numerous employment and civil rights statutes, enacted both before and after Title IX, in which Congress has explicitly prohibited retaliation against persons who either oppose the explicitly prohibited discrimination or participate in the enforcement of the statute.[4] Had Congress intended to prohibit retaliation against persons who oppose alleged discrimination in violation of Title IX, it would have done so. Congress's failure to prohibit retaliation under Title IX evidences its intent not to expand the protection of Title IX beyond those who may be subjected to sex discrimination itself.

Respondents recognize that this Court has recently found a limited, implied right of action under Title IX for victims of conduct explicitly prohibited by Title IX. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60

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[4] For example, Congress has explicitly prohibited retaliation in the National Labor Relations Act, 29 U.S.C. § 158(a)(4); the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2) and (4); the Age Discrimination in Employment Act, 29 U.S.C. § 623(d); the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c); the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1140; the Migrant and Seasonal Agricultural Protection Act, 29 U.S.C.§ 1855 (a); the Employee Polygraph Protection Act, 29 U.S.C. § 2007(a); the Family and Medical Leave Act, 29 U.S.C. § 2615(a) and (b); the Federal Labor-Management and Employer Relations Act, 5 U.S.C. § 7116(a)(4); the Federal Mine Safety and Health Act of 1977, 22 U.S.C. § 815(c); the Longshore and Harbor Workers Act, 33 U.S.C. § 948a; the Veterans' Employment and Readjustment Rights Act, 43 U.S.C. § 4311(c); and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). This is only a partial list of federal statutes that Congress has explicitly supplemented with anti-retaliation provisions. The inclusion of anti-retaliation provisions is so common as to be routine, and for that reason, the exclusion of one in Title IX is compelling.

(1992); *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The Court, however, has never expanded the scope of Title IX to prohibit conduct other than sex discrimination or expanded the class of those protected beyond persons who have been subjected to sex discrimination. In fact, the opinions in *Franklin* and *Cannon* support the analysis urged by respondents.

In *Cannon*, the Court explicitly recognized that the first prerequisite for implying a cause of action under a statute which does not provide an explicit remedial scheme is that the plaintiff must be a member of the class protected by the statute. "*First*, the threshold question under Cort is whether the statute is enacted for the benefit of a special class of which plaintiff is a member." *Cannon* at 689 (emphasis original), *citing Cort v. Ash*, 422 U.S. 66 (1975). Furthermore, *Cannon* insists that the class protected from discrimination be identified by the statute: "[B]ecause the right to be free of discrimination is a 'personal' one . . . a statute conferring such a right will almost have to be phrased in terms of the persons benefited." *Id.* at 690, n.13. The class of persons to whom Holt allegedly belongs – professors who report alleged discrimination against students to school trustees – is not protected by Title IX.

Similarly, in *Franklin*, the Court relied on Blackstone's *Commentaries* in stating that "'*where there is a legal right*, there is also a remedy, by suit or action at law, whenever that right is invaded.'" *Franklin* at 66 (emphasis added). The Court correctly found that Title IX confers an unquestioned right to be free from sex discrimination in federally funded education programs. Title IX does not, however, confer a right to be free from discrimination on some basis other than sex. Since Title IX does not confer a legal right, under *Franklin* and *Cannon*, there can be no remedy.

The Court's opinion in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982) further compels the this result. There, the Court stated that: "There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep *as broad as its language.*" *Id.* at 521 (emphasis added, citations omitted). There can be no doubt that extending the protection of Title XI to Holt requires an extension far beyond the breadth of the language of Title IX. Title IX contains no language prohibiting retaliation against persons who report alleged discrimination to institution trustees.

Petitioner relies heavily upon this Court's opinion in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S.229 (1969), for the proposition that this Court ought to create a substantive prohibition against retaliation whenever a person alleges that he is championing the rights of others. In *Sullivan*, a corporation organized to operate a community park interfered with the right of a white lessor to assign his membership share to a lessee because the lessee was black. Both the black lessee and the white lessor sued under 42 U.S.C. § 1982, which provides that all citizens shall have the same right to convey property as is enjoyed by white persons.[5]

Holt's reliance on *Sullivan* is misplaced for several reasons. First, Holt is in an entirely different posture than the white plaintiff in *Sullivan*. In *Sullivan*, the white plaintiff was suing because of a substantive violation of the Act itself. The white plaintiff was adversely affected by the discriminatory transaction – his attempted conveyance of the property to a black person was restricted because of race.

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[5] 42 U.S.C. § 1982 reads as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

He was not bringing a "whistle-blower" action, but was himself injured in the actual racially discriminatory interference with the right to ownership of property without regard to race. In *Sullivan*, "the language of the statute explicitly conferred a right directly on a class of person that included the plaintiff in the case." *Cannon* at 690, n. 13. In the present action, Holt does not allege that he was injured by the allegedly discriminatory action against the unnamed female student. In fact, Holt does not even identify the alleged discriminatory action. Holt, instead, seeks to extend the protection of Title IX beyond the class of persons it was intended to protect, to those persons congress chose not to cloak with statutory protection – i.e. persons who do not file complaints with the Department of Education but who talk about sex discrimination complaints outside their institutions' proper channels without regard to the institutions' procedures for addressing and remedying discrimination. Holt's factual circumstances are not analogous to those of the white plaintiff in *Sullivan.*

Second, *Sullivan* was based entirely upon the Court's earlier holdings in cases involving racial discrimination in the conveyance of property, such as *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). The Court noted that in those cases, and under those historical circumstances, the white property owner was "the only effective adversary" of the unlawful restrictive covenant. *Sullivan* at 237, *quoting*, *Barrows v. Jackson*, 346 U.S. 249, 259 (1953), *reh'g denied* 346 U.S. 841 (1953). There is no suggestion here that the unnamed female student could not be an effective advocate for herself. Indeed, there is not even any suggestion that Samford had not fully addressed and remedied the alleged discrimination against the student. Furthermore, it is undisputed that the female student was entitled to complain about the discrimination against herself to the Department of Education under its procedural regulations, and indeed entitled to file a lawsuit to

vindicate her right to be free of sex discrimination under *Cannon* and F*ranklin.*

Third, the *Sullivan* Court did not address the issue of whether a substantive prohibition against retaliation should be inferred from § 1982. Instead, the Court addressed the white lessor's claim in terms of constitutional standing to assert the rights of the black lessee, relying entirely upon *Barrows*, which is a seminal third-party standing case. Holt is not attempting to assert the rights of the unnamed female student to be free from sex discrimination in this action. Holt did not assert third-party standing, and this case has not been submitted to a standing analysis.

In short, *Sullivan* simply does not hold that courts should infer a substantive prohibition against retaliation whenever Congress has chosen not to express one. Holt has cited no authority of this Court for the judicial creation of a substantive prohibition of conduct that Congress has obviously chosen not to prohibit.

II. There Is No Split Among The Circuits On The Issue Of Whether A Person In Holt's Circumstances Is Protected From Retaliation Under Title IX.

Petitioner argues that there is a "split" among the circuits on the issue presented in this petition. The asserted "split" is not so clear as Holt argues. In *Brine v. University of Iowa*, 90 F.3d 271 (8th Cir. 1996), the plaintiffs brought claims for, *inter alia*, retaliation under Title VII, Title IX and the Iowa civil rights statutes. *Id.* at 273. The Eighth Circuit reversed the jury verdict in favor of plaintiffs on the retaliation claims. The court used a generic retaliation analysis, never specifying whether it applied to the Title IX claims. *Id.* at 273-74. The court did not address the issue of whether "retaliation" is prohibited by Title IX, and certainly

did not hold that a person in Holt's position is entitled to the protection of Title IX.

In *Murray v. New York University College of Dentistry*, 57 F.3d 243 (2d Cir. 1995), the plaintiff alleged that the institution had refused to allow her to proceed with her third-year course of study in retaliation for her filing sexual harassment complaint with the College's EEO office. Although the court cited *Preston v. Commonwealth of Virginia ex rel New River Community College*, 31 F.3d 203 (4th Cir. 1994), for the proposition that the evidence in support of a retaliation claim should be analyzed using the same evidentiary standards under Title VII or Title XI, *Id.* at 248, 251, there is no indication in the opinion that the court was presented with or decided the question whether Title IX prohibits retaliation in the first place.

In both these cases, the courts have at most merely assumed, without analyzing the issue or deciding it, that Title IX prohibits retaliation and that a private cause of action may exist to remedy such retaliation. It would be inappropriate and against the interest of judicial economy for this court to decide the issue prematurely without a body of appellate court decisions that squarely face the issue raised by Holt in this case.

Even the case upon which Holt places his primary reliance, *Preston*, does not squarely address the issue raised here by Holt. In *Preston*, the plaintiff filed a complaint of sex discrimination with the Department of Education's Office of Civil Rights ("OCR") alleging that her employing education institution discriminated against her on the basis of her sex. *Id.* at 205. She alleged in a subsequent Title IX lawsuit that the institution denied her an employment position because she had filed her earlier sex discrimination complaint with the OCR.

The *Preston* court engaged in a tortured, double-bootstrapping analysis in order to find: (1) that the Department of Education intended to incorporate the *substantive* prohibition against retaliation contained in its Title VI regulations when it incorporated the p*rocedural* Title VI regulations into its Title IX regulations[6]; and (2) that the plaintiff had a private right of action to enforce the substantive prohibition of conduct contained in the Title VI regulations. *Preston* at 206, n.2.

The district court in this case correctly recognized that Holt would not be entitled to maintain an action even if it followed the reasoning of *Preston*. *Holt v. Lewis*, 955 F.Supp. at 1389. Unlike the plaintiffs in *Preston*, *Murray* and *Brine*, Holt does not allege that he was subjected to sex discrimination himself. Furthermore, unlike the plaintiff in *Preston*, there is no allegation that he "filed a claim of discrimination" with the OCR or that he "testified, assisted, or participated in any manner in an investigation, proceeding or hearing". Even if the Court were to infer a substantive

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[6] The Title IX regulations provides:

> § 106.71 Procedures.
>
> The *procedural* provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 C.F.R. 100.6-100.11 and 34 C.F.R., Part 101.

34 C.F.R. § 106.71 (emphasis added). The *substantive* prohibition against retaliatory conduct in the Title VI regulations reads as follows:

> § 100.7 Conduct of Investigations.
>
> (e) Intimidatory or retaliatory acts prohibited.
>
> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e)

prohibition against retaliation based upon the Title VI regulations as the Fourth Circuit did in *Preston*, it is undisputed that Holt did not engage in the protected activity – filing a claim of discrimination with the OCR – for which he could not be penalized by his employer.

The Second, Fourth, and Eighth Circuits have not been presented with the question whether a professor who reports alleged sex discrimination – not against himself but against a female student – to a university trustee, and does not file a complaint with the Department of Education, is protected against retaliation under Title IX and is entitled to maintain an action for such retaliation. Conversely, the Eleventh Circuit has not been faced with the question of whether a female employee who files a complaint with the Department of Education stating that she has been discriminated against on the basis of her sex, is entitled to protection for retaliation by Title IX. There is not a split among the circuits over these issues, and therefore the issues are not sufficiently developed for a meaningful review by this Court.

III. This Case Is Not Appropriate For Review By This Court Because The Judgment Against The Individual Respondents Is Based Upon Separate And Independent Grounds That Petitioner Has Not Appealed Or Requested This Court To Review.

This case is not appropriate for review by this court on petition for writ of certiorari because the judgment in favor of individual respondents Lewis, Dean and Hull is based upon adequate, independent grounds that petitioner neither appealed nor sought to be review by this Court. Lewis, Dean and Hull filed a motion to dismiss the action against them pursuant to Rule 12(b)(6) based upon the

grounds that they were not subject to suit under Title VII of under Title IX. The district court granted the motion of Lewis, Dean and Hull to dismiss on December 13, 1995.

Holt's notice of appeal to the Eleventh Circuit specified that petitioner was appealing from the order granting the motion for judgment on the pleadings filed by all respondents. Lewis, Dean and Hull filed a motion requesting the Eleventh Circuit to dismiss the appeal against them because petitioner had not appealed from the order granting their separate motion to dismiss. The Eleventh Circuit carried the motion with the case, and dismissed it as moot after affirming the order and opinion of the district court. In his petition for writ of certiorari, Holt requested this Court to review only the following question: "Is there an implied right of action for retaliation under Title IX?" Holt did not ask this court to review the dismissal of Lewis, Dean and Hull on any other grounds.

The order granting the motion to dismiss of Lewis, Dean and Hull is completely dispositive of the action against them. The district court held that petitioner's claims against Lewis, Dean and Hull were due to be dismissed because they were not subject to suit under either Title VII or Title IX.

This Court's review of the judgment in favor of Lewis, Dean and Hull would be a waste of judicial resources. Whether Title IX protects against alleged retaliation under the circumstances Holt alleges, and whether there is an implied cause of action under that theory, are moot questions because the action against Lewis, Dean and Hull has been dismissed regardless of the how the other questions might be decided. Consequently, this Court should not grant the writ to review this action.

CONCLUSION

The Court should not grant Holt's petition for certiorari in order to create a substantive prohibition of conduct that congress has chosen not to prohibit by Title IX. Furthermore, Holt is not entitled to the protection of Title IX because he is not a member of the class the statute was enacted to protect. Therefore, the Court should not grant the petition in order to infer a private right of action based upon a substantive prohibition of conduct that does not exist. Even if there were a substantive prohibition against retaliation for filing a written complaint of discrimination with the OCR, Holt has undisputedly not engaged in that protected activity. There is no true split among the circuits because no other circuit has ever decided whether a person in Holt's circumstances is entitled to protection from retaliation under Title IX.

Finally, the Court should deny the petition because the judgment against the individual respondents is based upon separate and independent grounds that Holt has neither appealed nor requested this Court to review.

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Appendix

APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 21, 1997

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-0646

D.C. Docket No. CV-95-AR-2574-S

DR. G.A. HOLT,

Plaintiff-Appellant,

versus

JOSEPH O. LEWIS, M.D., JOSEPH O. DEAN, DR., WILLIAM E. HULL, M.D., both individually and in their official capacity, SAMFORD UNIVERSITY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama
(February 21, 1997)

Before DUBINA and BLACK, Circuit Judges, and EISELE*, Senior District Judge.

* Honorable Garnett Thomas Eisele, Senior U.S. District Judge for the Eastern District of Arkansas, sitting by designation.

PER CURIAM:

We affirm the district court's judgment of dismissal based on its well-reasoned memorandum opinion entered on December 13, 1995.

AFFIRMED.

APPENDIX B
MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA ENTERED DECEMBER 13, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
CV-95-AR-2574-S

DR. G.A. HOLT,

Plaintiff,

v.

JOSEPH O. LEWIS, et al.,

Defendant.

MEMORANDUM OPINION

The court has before it two potentially dispositive motions filed by defendants in the above-entitled action. The first is a motion to dismiss filed by defendants Joseph O. Lewis ("Lewis"), Joseph O. Dean ("Dean"), and William E. Hull ("Hull") (collectively "the individual defendants"), on October 10, 1995. The second is a motion for judgment on the pleadings filed jointly by the individual defendants and defendant Samford University ("Samford") on October 19, 1995. Because plaintiff can prove through his complaint and through the pleadings now before the court no set of facts

that will entitle him to relief, both motions are due to be granted, and the action will be dismissed as to all parties.

I. The Facts

Plaintiff Dr. G.A. Holt ("Holt") was employed by Samford as a professor in its School of Pharmacy from 1991 to 1994. During his tenure at Samford, Holt often supported those of his students who complained of discrimination at the hands of Samford and brought his concerns about the alleged discriminatory treatment of students to the attention of Samford officials in accordance with Samford's anti-discrimination policy.

In September of 1993, Holt was informed by a female student that she was being discriminated against on the basis of her gender. Holt directed this student to the appropriate Samford officials and then personally notified the offices of the Dean of the School of Pharmacy and the Samford Provost of the situation. During the following month after being notified by Lewis to keep the matter private, Holt telephoned a Samford trustee, Dr. Phillip Walton, and informed Dr. Walton of his concerns regarding the situation. Following this contact with Dr. Walton, Holt's relationship with Samford and the School of Pharmacy deteriorated significantly. After a repeated warning from Lewis in December of 1993 that Holt should forget the situation, Holt was informed on January 27, 1994, that Samford was not going to renew his contract. The reason given to Holt for this action by Samford officials was that Holt had gone to Dr. Walton with the discrimination complaint. Rather than face the stain of a termination in his professional record, Holt resigned his post at Samford.

Holt filed his complaint in this action on August 30, 1995, with the Circuit Court of Jefferson County, Alabama, alleging violations of both Title VII of the Civil Rights Act

of 1964 ("Title VII"), 42 U.S.C.2000e et seq., and Title IX of the Educational Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 et seq. Defendants removed the action to this court on October 6, 1995.

II. Analysis

When ruling on either a motion to dismiss or a motion for judgment on the pleadings, the court must view the pleadings in the light most favorable to the non-moving party and likewise draw all inferences in favor of the non-movant. United States v. Wood, 925 F.2d 1580, 1581 (7th Cir.1991). The court may grant either motion only where it is beyond doubt that the non-movant can prove no facts that would support his claim for relief. Pataula Elec. Membership Corp. v. Whitworth, 951 F.2d 1238, 1240 (11th Cir.), cert. denied 506 U.S. 907, 113 S.Ct. 302, 121 L.Ed.2d 225, and cert. denied sub nom. Georgia Power Co. v. Pataula Elec. Membership Corp., 506 U.S. 907, 113 S.Ct. 302, 121 L.Ed.2d 225 (1992).

a. The Individual Defendants

Defendants Lewis, Dean and Hull seek a dismissal on two grounds. First, they claim that they are not employers under Title VII and for that reason cannot be held liable for any violations of that act. The relief granted under Title VII is against the employer. Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir.1991). When an employer has been made a party to a Title VII action, specific persons named in either their individual capacities or as agents of their employer are improper defendants. Id. ("[T]he proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly." (emphasis added)). Therefore, these individual defendants' motion to dismiss is due to be granted insofar as they have been sued under Title VII in both their individual and official

capacities.

These defendants also claim that they are similarly impervious to Title IX liability. Title IX applies to entities, including persons, who receive federal funds. 20 U.S.C. § 1681. Clearly this implicates defendant Samford due to the federal financial assistance provided to Samford students. Grove City College v. Bell, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984). However, there is no indication in the statute that actions to enforce the provisions Title IX can be directed against anyone other than the educational institution involved. Dickinson v. McCarty, No. 93- 8210, 1994 WL 706979 at *5 (S.D.Fla. Aug. 2, 1994). See also Doe v. Petaluma City School Dist., 830 F.Supp. 1560, 1576-77 (N.D.Cal.1993). Thus, defendants' motion to dismiss is due to be granted, and plaintiff's Title IX claims must be dismissed as to defendants Lewis, Dean and Hull in both their individual and official capacities. Because plaintiff's claims both under Title VII and under Title IX can only be directed at defendant Samford as both the employer and the educational institution involved, the motion to dismiss of defendants Lewis, Dean and Hull must and will be granted.

b. Title VII Retaliation

Count I of the complaint alleges that plaintiff was constructively discharged from his position in retaliation for his continuing efforts to make Samford officials aware that sex-based discrimination of students was taking place. Plaintiff contends that such a retaliatory discharge is unlawful under Title VII. The anti-retaliation provision of Title VII states:

> It shall be an unlawful employment practice for an employer to ... discriminate against any individual ...
>
> because he has opposed any practice made an unlawful employment practice by this subchapter....

42 U.S.C. § 2000e-3(a). "[A] plaintiff alleging a retaliation claim under Title VII must begin by establishing a prima facie case; the plaintiff must show (1) that [he] engaged in statutorily protected activity, (2) that an adverse employment action occurred, and (3) that the adverse action was causally related to the plaintiff's protected activity." Coutu v. Martin County Bd. of County Comm'rs, 47 F.3d 1068, 1074 (11th Cir.1995). Defendants, including Samford, attack plaintiff's complaint on the grounds that his notification to Samford officials that students were being unfairly discriminated against on the basis of their gender is not a statutorily protected activity and thus plaintiff has failed to establish his prima facie case.

The initial element of plaintiff's prima facie case is "established if [he] can show that he opposed an unlawful employment practice which he reasonably believed occurred." Bigge v. Albertsons, Inc., 894 F.2d 1497 (11th Cir.1990) (emphasis added). Title VII defines an employment practice as follows:

> It shall be an unlawful employment practice for an employer--
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). "[I]n enacting Title VII of the Civil

Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of ... sex...." Franks v. Bowman Trans. Co., 424 U.S. 747, 763, 96 S.Ct. 1251, 1263, 47 L.Ed.2d 444 (1976) (emphasis added).

Taking the facts alleged by plaintiff as true, plaintiff's complaint fails to state a cause for retaliation for which relief can be granted under Title VII. Plaintiff alleges that he championed the cause of "a woman student " who was "a victim of sexual discrimination" at Samford. Complaint at ¶ 7 (emphasis added). He has not alleged that this student was discharged from employment, not chosen for employment, or otherwise denied any privilege of employment by Samford. Framing the allegations of the complaint in the light most favorable to plaintiff, he has only asserted that a female student was being unfairly treated by an instructor and that his opposition to this treatment ultimately led to his constructive discharge. This in no way indicts any employment practice on behalf of Samford. Without more, any retaliation by defendants for plaintiff's advocacy of a student's rights is simply not prohibited by Title VII.

Because plaintiff did not oppose a discriminatory action that is proscribed by the statute, plaintiff fails to state a claim of retaliation under Title VII, and defendants' motion is due to be granted.

c. Title IX Retaliation

Defendants also argue that dismissal is proper as to Count II, plaintiff's Title IX claim, on the grounds that Title IX does not provide a private cause of action for retaliation to a "whistle blower" who has not himself suffered sex-based discrimination. Title IX provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

> be subjected to discrimination under any education program or activity receiving Federal financial assistance....

20 U.S.C. § 1681(a). Remarkably absent from Title IX, however, is an express statutory remedy for retaliation. The Supreme Court has recognized that a limited implied cause of action exists to enforce private rights under Title IX for those plaintiffs who have directly suffered sex-based discrimination. Cannon v. University of Chicago, 441 U.S. 677, 717, 99 S.Ct. 1946, 1968, 60 L.Ed.2d 560 (1979). This implied private right of action has even been extended past the injunctive remedy allowed in Cannon to provide for monetary relief where educational institutions have discriminated on the basis of a person's gender. Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 64-66, 112 S.Ct. 1028, 1032, 117 L.Ed.2d 208 (1992). However, neither the Supreme Court nor the Eleventh Circuit has recognized a cause of action for retaliatory discharge under Title IX.

Unlike the creators of § 2000e-3(a) of Title VII, the congressional authors of Title IX failed to include any express protections against retaliation when considering the problems of gender equity in our nation's educational institutions. This failure to speak is significant when compared to § 2000e-3, a vital piece of the Title VII safeguards enacted only eight years prior to Title IX. When presented with such a stark contrast in otherwise closely related civil rights legislation, it is helpful to keep in mind that "congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated." United States v. Azeem, 946 F.2d 13, 17 (2d Cir.1991). Congress has shown that where it intends to outlaw retaliation in the protection of civil rights, it will do so. Plaintiff has failed to persuade this court that the omission of such protection from Title IX is a mere oversight.

Having said this, this court acknowledges a limited trend by other courts that recognize "retaliation" claims under Title IX. See Preston v. Commonwealth of Virginia ex rel. New River Community College, 31 F.3d 203 (4th Cir.1994); Clay v. Board of Trustees of Neosho Community College, 905 F.Supp. 1488 (D.Kan. 1995). The standard bearer for this trend and the case primarily relied upon by plaintiff for arguing that such a cause of action exists is Preston. Beside the obvious statement that Fourth Circuit law is not binding precedent in this case, this court respectfully declines to be swept up in this trickle and expressly refuses to turn it into a veritable flood by creating a second layer of implied theory of liability by expanding dramatically upon a non-binding opinion which created an implied cause of action only within the Fourth Circuit.

The court in Preston found an implied cause of action for retaliation existed under Title IX after the plaintiff was dismissed for filing complaints[1] of sex-based discrimination against her employer. Preston, 31 F.3d at 206. The Fourth Circuit reached its matter-of-fact conclusion that such a retaliation claims exists after finding its authorization in the Department of Education ("the DOE") regulations found at 34 C.F.R. § 106.71 (1995).[2] Id. at n. 2. The Preston court

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[1] Preston, employed as a counselor for student support services, was dismissed after filing claims of discrimination with the Office of Civil Rights of the Department of Education as well as with the Equal Employment Opportunity Commission. Preston, 31 F.3d at 205. In contrast, Dr. Holt alleges that he was forced to resign after notifying a Samford trustee of a continuing problem with gender based discrimination of students at the school.

[2] This regulation states:

> § 106.71 Procedures.
> The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 C.F.R. 100.6-100.11 and 34 C.F.R.,

held that § 106.71's incorporation of the DOE regulations regarding Title VI of the Civil Rights Act of 1964, more specifically 34 C.F.R. § 100.7(e),[3] was a sufficient basis for creating an anti-retaliation private cause of action under Title IX. Id.

First and foremost, this court expressly rejects the Preston analysis in favor of its own "failure to speak" appraisal discussed above. The Preston court has derived a private cause of action from an agency regulation incorporating the procedural provisions of the regulations created to control the investigation of claims of racial discrimination in educational institutions under Title VI of the Civil Rights Act of 1964. This tortured link manufactured in Preston pales when compared to the argument that Congress knows how to write remedial legislation but has chosen not to do so for potential Title IX retaliation plaintiffs.

Furthermore, were this court inclined to build on the sandy foundation established by Preston and its progeny, the facts framed by plaintiff's complaint do not provide a compelling case for doing so. Plaintiff does not allege that he was discriminated against due to his gender--circumstances that were unquestionably the motivating basis for the creation of

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Part 101.
34 C.F.R. § 106.71 (1995) (emphasis added).

[3] The relevant portion of this regulation states:

> § 100.7 Conduct of investigations.
> (e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e) (1995) (emphasis supplied).

Title IX. His anguished cry for relief from his constructive discharge for allegedly championing the rights of those who are clearly entitled to protection is just too far logically removed from the coverage of Title IX to move this court to create a private cause of action for retaliation at this time.

Because Title IX does not provide a private cause of action for plaintiffs who claim retaliatory discharge, dismissal is proper on this issue as to all defendants and the defendants' motion for judgment on the pleadings is due to be granted.

III. Conclusion

Because supervisory personnel, whether named in their individual or official capacities, are not proper targets for either a Title VII retaliation claim where the actual employer is a named defendant or a Title IX claim under any circumstance, plaintiff's action is due to be dismissed as to defendants Lewis, Dean and Hull. Furthermore, because plaintiff neither engaged in any activity protected by Title VII nor was discharged in violation of Title IX, both Counts of plaintiff's complaint are due to be dismissed as to all defendants. Because the court can foresee no circumstance whereby plaintiff can recast the claims in his complaint to state a valid cause of action under either Title VII or Title IX, the court will not grant plaintiff leave to amend his complaint. Friedlander v. Nims, 755 F.2d 810, 813 (11th Cir.1985). Accordingly, both the motion to dismiss and the motion for judgment on the pleadings now before the court are due to be granted and plaintiff's action will be dismissed with prejudice. A separate and appropriate order will be so entered.

DONE this the 13th day of December, 1995.

S/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
CV-95-AR-2574-S

DR. G.A. HOLT,

Plaintiff,

v.

JOSEPH O. LEWIS, et al.,

Defendant.

ORDER

In accordance with the accompanying memorandum opinion, both the joint motion of Joseph O. Lewis ("Lewis"), Joseph O. Dean ("Dean"), and William E. Hull ("Hull") to dismiss as will as the joint motion of Lewis, Dean, Hull and Samford University for judgment on the pleadings are hereby GRANTED, and the action is DISMISSED WITH PREJUDICE.

Costs are taxed against plaintiff, Dr. G.A. Holt.

DONE this the 13th Day of December, 1995.

S/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE